Supreme Court, U.S.
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No. 84-1859

In The
Supreme Court of the United States
October Term, 1984

STUART MARSH,

Petitioner,

v

BOARD OF EDUCATION OF THE CITY OF FLINT, a Public Corporation; LEO MACKSOOD, individually and as President of the Board of Education of the City of Flint; UNITED TEACHERS OF FLINT, INC., a Michigan Corporation; HAROLD KEIM, individually and as President of United Teachers of Flint, Inc.; LANE HOTCHKISS individually and as Chief Negotiator and Grievance Officer of United Teachers of Flint, Inc.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—AND APPENDIX—

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QUESTION PRESENTED

SHOULD CERTIORARI BE DENIED WHERE (1) THE LOWER COURTS CORRECTLY DECIDED THIS CASE, (2) THE DECISION BELOW DOES NOT RESULT IN A SPLIT OF AUTHORITY BETWEEN THE CIRCUITS, (3) THIS CASE IS POORLY POSTURED FOR REVIEW, (4) OTHER CASES NOW BEFORE THE COURT ARE MORE APPROPRIATE FOR REVIEW OF THE ISSUES PRESENTED, AND (5) THIS CASE IS MOOT?

Petitioner answers "Yes."

Respondents answer "No."

The lower courts did not answer this question.

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STATEMENT OF THE CASE

This Brief is filed on behalf of Respondents United Teachers of Flint, Inc., Harold Keim and Lane Hotchkiss.* Due to omissions and inaccuracies in Petitioner's Statement of the Case, the following is presented for the Court's consideration.

Petitioner's Statement inaccurately describes the voluntary affirmative action plan negotiated between Respondents Board of Education and United Teachers of Flint, ignores some of the predicates for the plant's implementation, exaggerates the effects of the plant's operation on Petitioner, and mischaracterizes the content of the decisions of the courts below.

The affirmative action provision in Respondents' collective bargaining agreement is not an illegal "quota" system, and does not utilize race as the sole criteria in determining assignments for counselors in the Flint School District. The criteria used in terms of assignment, layoff, and recall include state certification (including special counseling endorsement), other qualifications, seniority, and the individual needs of various schools in the School District, in addition to race. It is simply incorrect to assert that race was the only consideration used to decide that Petitioner should be transferred to a teaching position during the years in question.

Nor is it correct to say that the sole predicate for implementation of the parties' affirmative action plan was a "mere statistical disparity" of minorities employed by the

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* Respondents thank Ms. Mary L. Titsworth for her assistance on the Brief.

Flint School District. To the contrary, and as was clearly pointed out by the District Court, the Flint School District had underutilized minorities in teaching and related positions, and had assigned them to schools on the basis of their race, for years. (See pp. 5-6 below.)

Petitioner's rather melodramatic description of the effect of the provision on his employment situation is likewise overdrawn. Petitioner was not "demoted" at all (although this is the characterization used by the District Court). He was merely transferred from a counseling position to a classroom teaching position. Petitioner was not laid off. He was not assigned to a position of lower status. He lost no salary or fringe benefits. Nor did he lose "competitive seniority," whatever that is. Seniority for members of the bargaining unit represented by the United Teachers of Flint is district-wide, and is based on total service in the district, not just service as a counselor.

Finally, Petitioner mischaracterizes the decisions below. The District Court did not find that the predicate for Respondents' affirmative action plan was "mere statistical disparities" in the work force at the time of adoption of the plan. Rather this affirmative action provision grew out of a long course of underutilization of minorities in the work force and various attempts to remedy the situation. Nor did the District Court find that the affirmative action plan was not temporary in nature, as alleged by Petitioner. Rather the District Court found that the affirmative action plan would exist "for the life of the collective bargaining agreement . . ." (Petitioner's Appendix, p. 32A). What Petitioner fails to reveal is that the agreement was only effective for three years.

Completely omitted from the Petition is any discussion of the educational or psychological aspect of affirmative action in public education. This is probably due to two reasons. First, Petitioner would probably dispute that affirmative action in public education does have important educational and psychological ramifications for the children involved and so fails to mention the issue. More importantly however, there was no trial in this matter. Thus, no expert testimony, pro or con, was adduced.

Our fellow Respondents will provide further factual detail regarding the above. Suffice it to say that for the reasons set forth below, Stuart Marsh's Petition for Writ of Certiorari should be denied.

———o———

SUMMARY OF REASONS FOR DENYING PETITION

Certiorari should be denied in this case for a number of reasons. First, the lower court reached the correct decision. The affirmative action plan in the present case meets the tests indicated by this Court in *University of California Board of Regents v. Bakke,* 438 U.S. 265 (1978), *United Steelworkers v. Weber,* 443 U.S. 193 (1979), and *Fullilove v. Klutznick,* 448 U.S. 448 (1980). The goal of eliminating past discrimination and underutilization of minorities, especially in public education, is valid and important, and the affirmative action plan at issue here is carefully tailored to achieve this goal.

Second, *certiorari* should be denied because the cases cited by the Petitioner do not indicate a split of authority on the issues presented. The holding in *Janowiak v. City of South Bend,* 750 F.2d 557 (7th Cir. 1984) does not con-

flict with the case at hand because the *Marsh* court did not rely solely on the statistical disparities present in *Janowiak. Fort Bend Independent School District v. City of Stafford,* 651 F.2d 1133 (5th Cir. 1981), and *Castaneda v. Pickard,* 648 F.2d 989 (5th Cir. 1981), are irrelevant because the facts and issues in those cases are completely different from those in *Marsh.*

Third, this case is not appropriate for review due to the inadequacy of the pleadings, affidavits and record. No trial was held. Additionally, the issue of employment discrimination in *Marsh* is complicated and intertwined with the issue of school desegregation.

Fourth, the case of *Wygant v. Jackson Board of Education,* 746 F.2d 1152 (6th Cir. 1984), *cert. granted,* 105 S. Ct. 2015 (1985), will provide the Supreme Court with more clearly delineated facts and the full record needed to decide such an important issue.

Finally, the present case should be dismissed as moot because an actual controversy no longer exists.

—o—

REASONS FOR DENYING THE PETITION

I. The Lower Court Correctly Decided This Case.

The Court of Appeals correctly decided that the affirmative action plan involved in this case does not violate the Fourteenth Amendment to the Constitution. This Court has addressed the constitutionality of affirmative action plans in *Fullilove v. Klutznick,* 448 U.S. 448 (1980), and *University of California Regents v. Bakke,* 438 U.S. 265 (1978). In *United Steelworkers v. Weber,* 443 U.S. 193 (1979), the Court considered related statutory issues in the private sector. The Sixth Circuit has, from these

opinions, formulated a sound and logical approach to the issue of the constitutionality of voluntary affirmative action plans in the public sector.

It is clear, from this Court's opinions in *Fullilove, Bakke,* and *Weber,* that affirmative action plans are not illegal *per se.* Admittedly, this Court has not decided the precise standard of review under which affirmative action plans should be scrutinized. However, a majority of Justices expressed the view, in *Fullilove* and *Bakke,* that some governmental interest must be served by the program, and the program must somehow be directed toward the achievement of that objective.

The Sixth Circuit, in a line of cases dealing with affirmative action plans beginning with *Detroit Police Officers' Association v. Young,* 608 F.2d 671 (6th Cir. 1979) and ending with the case at hand, has adopted the same analysis, and applied it in this case. The decision here is in agreement with the opinions of the Supreme Court in holding that the goal of remedying past discrimination is a legitimate goal of this affirmative action plan, and that this plan is sufficiently tailored toward achievement of that goal to survive judicial scrutiny.

This Court has expressed the view that the purpose of remedying past discrimination is a valid governmental objective. *Fullilove v. Klutznick, supra.* The Sixth Circuit opinion in *Marsh* merely reflects this view. The District Court made ample findings of past employment disparities in the Flint School System to justify the plan. For example, the first black counselor was not hired until 1963. In addition, the court found minorities were substantially underrepresented in teaching and counseling positions in the Flint School System, and, when hired, were

usually assigned to schools with predominantly black student populations. Thus, the court found substantial underrepresentation of blacks as school counselors and a pattern of underutilization of minorites as teachers and counselors in the school district.

The Sixth Circuit also followed the guidance provided by this Court on the methods by which affirmative action may be implemented. In *Bakke,* Justices Brennan, White, Marshall and Blackmun indicated that the plan was substantially related to the stated goal of remedying past discrimination, in part because the plan did not stigmatize any discreet group or individual. In *Weber,* the court majority found that the affirmative action plan fell on the "permissible side of the line," 443 U.S. at 208, for several reasons. First, the plan was "designed to break down old patterns of racial segregation and hierarchy." *Id.* Second, the plan did not unnecessarily trammel the interests of the white employees. Third, the plan was temporary in nature.

The Sixth Circuit has exactly followed these guidelines from *Bakke* and *Weber* in the *Marsh* opinion. For example, the lower court found that the plan relates to the objective of remedying underrepresentation of blacks in a sensitive teaching position. The plan is also temporary—it lasts only until the end of the collective bargaining agreement. Finally, the plan does not stigmatize or "trammel" the interests of white employees. Marsh was merely transferred from one position to another. Thus, the means employed, the affirmative action plan, closely relate to the objective of remedying past discrimination, and do not un-

necessarily invade the legitimate interests of nonminority employees.*

II. The Cases Cited By Petitioner Do Not Indicate A Split Of Authority Between The Circuits On The Issues Presented.

First, the Petitioner charges *Marsh* conflicts with the holding in *Janowiak v. City of South Bend*, 750 F.2d 557 (7th Cir. 1984) that evidence of statistical disparity alone fails to prove past discrimination and cannot justify the adoption of an affirmative action plan. There is no conflict between *Marsh* and *Janowiak*, however, because the *Marsh* court did not rely solely on statistical disparities between the percentages of blacks employed and the percentage of blacks in the community.

The *Marsh* court also relied on other evidence to show a legitimate predicate for affirmative action. For example, the court found that in 1959 there were only 12 black teachers in the district's junior high schools and 4 in the district's high schools. Additionally, the court found as blacks were hired into the system, they were usually assigned to schools with predominantly black student bodies. Relating to guidance counselors, the court found the first black counselor was not hired until 1963. *Marsh v. Board of Education of the City of Flint*, 581 F. Supp. 614, 621-622 (E.D. Mich. 1984). (Petitioner's Appendix, App. 20a-21a.) Thus, the lower court did not merely discuss the statistical disparity between the percentage of minorities employed and the percentage of minorities in the community as the

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*In his argument, Petitioner finds fault with the lower courts' use of various statistical comparisons. Brief for Petitioner at 9. The Petitioner did not raise this issue below, it was waived, and the argument will not be addressed in this Brief.

lower court did in *Janowiak*. There is no conflict between the Sixth Circuit opinion in *Marsh* and the Seventh Circuit opinion in *Janowiak*.

The Petitioner's reliance on *Fort Bend Independent School District v. City of Stafford*, 651 F.2d 1133 (5th Cir. 1981), and *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981) is equally unfounded. The Petitioner states that these Fifth Circuit cases reject the method of statistical comparison between student and faculty populations to identify discrimination in teacher employment. However, the facts and issues involved in both of those cases are so clearly different from those in the present case as to render the former irrelevant. These were school desegregation cases, and involved court ordered affirmative action, not a voluntary plan.

The reliance of the Petitioner on the *Janowiak, Fort Bend* and *Castaneda* opinions to show a conflict in circuits on this issue is completely unfounded. The cases cited by the Petitioner do not indicate a split of authority between the circuits on the issues presented.

III. This Case Is Not Well Suited For Review By The Supreme Court.

In addition to the fact that the Court of Appeals reached the correct result and that no conflict between the circuits exists, the *Marsh* case is otherwise inappropriate for review. In the District Court, this case was simply not handled with the care and attention which the issues deserve. There has been no trial on the merits of this case. No expert testimony regarding the educational and psychological importance of affirmative action in employment in public education was possible. The District Court de-

cided the case on Respondents' motions for summary judgment after a brief hearing. *Certiorari* should be denied due to the lack of a sufficient record and evidence to decide the case on its merits, and because this Court, even if it rules in Petitioner's favor, would merely be required to remand for trial anyway.

IV. Other Cases Presently Before This Court Are More Suitable For Review Of The Issues Raised In This Matter.

A more sufficient record and more clearly delineated facts are provided by *Wygant v. Jackson Board of Education,* 746 F.2d 1152 (6th Cir. 1984), *cert. granted,* 105 S. Ct. 2015 (1985), a case scheduled for review by this Court this term. Although *Wygant* and *Marsh* raise the same general legal issue left open by this Court in *United Steelworkers v. Weber*—the validity under the Fourteenth Amendment of a voluntary affirmative action plan in public sector employment—*Wygant* is a much more appropriate case for review for several reasons.

First, the facts in *Wygant* are more amenable to deciding the important legal issue presented. In *Wygant,* teachers were actually laid off pursuant to the affirmative action plan and the collective bargaining agreement. In *Marsh,* the Petitioner was merely transferred. He has, in fact, suffered no real damages at all.

In addition, the issue of the validity of the affirmative action plan in *Wygant* remains uncomplicated by the fact that the Jackson Public Schools have not been involved in prior, formal desegregation proceedings. The issue of the validity of the affirmative action plan in *Marsh* is intertwined with the history of school desegregation in the Flint School District. Thus, *Wygant* is a more appro-

priate case for review on this issue due to the more clearly identifiable impact on employees caused by layoffs, the lack of complication of the issues, and the more fully developed record in *Wygant*.

V. This Case Is Moot.

Finally, *certiorari* should be denied in this case because the case is moot. Petitioner brought this action only on behalf of himself. Class litigation was not involved. During the course of litigation, Marsh was reinstated in his position as a counselor. (Affidavit of Stuart Boze, App. 3.)

It is highly improbable that Petitioner will be assigned to a classroom teaching position for the remainder of his teaching career. (App. 4.) Thus, the relief he sought has been attained, and there is no reasonable expectation that the wrong he alleges will be repeated in the future.

The requirement that an actual controversy must exist at all stages of appellate review has thus been violated. *Roe v. Wade*, 410 U.S. 113 (1973). When a case becomes moot while pending review, it should be dismissed. *Certiorari* should therefore be denied. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

———o———

CONCLUSION

For these reasons it is respectfully requested that this Honorable Court deny Stuart Marsh's Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: July 23, 1985

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Sixth Circuit Court of Appeals
Case No. 84-1240

U.S. District Court Case
No. 80 40349 (ED Mich)

STUART MARSH,

Plaintiff-Appellant,

-vs-

BOARD OF EDUCATION OF CITY OF FLINT, et al,

Defendants-Appellees.

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_____/

AFFIDAVIT IN SUPPORT OF
DEFENDANTS-APPELLEE'S
(BOARD OF EDUCATION)
MOTION TO DISMISS

STATE OF MICHIGAN)
) ss:
COUNTY OF GENESSE)

STUART A. BOZE, being first duly sworn, says:

1. He is the Executive Director, Personnel Services for Defendant-Appellee Board of Education of the School District of the City of Flint (Board).

2. He has knowledge of the facts herein and, if sworn, can testify competently with regard thereto.

3. Stuart A. Marsh is a teacher in the School District of the City of Flint (District). He has been employed by the Board continuously since September 7, 1965. He has accrued seniority in the teacher bargaining unit since the date of his employment.[1] Since September, 1967, Mr. Marsh's employment has been governed by individual contracts and by collective bargaining agreements between the Board and Defendant-Appellee, United Teachers of Flint (UTF), the collective bargaining agent for Flint teachers.

4. On September 7, 1965 Mr. Marsh was assigned to Northwestern High School as a teacher of English. He continued to teach English, Homeroom or Foreign Relations until September, 1970.

5. In September, 1970 Mr. Marsh was assigned to a student counselor position. Student counselors are employed only in the secondary schools. He continued as a student counselor until the beginning of the 1980-81 academic school year.

6. In September, 1980 the Board reduced the number of student counselors from 52 to 48. Acting under affirma-

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[1] Seniority is systemwide seniority. Seniority accrues from the date of employment. Seniority does not accrue during unpaid leaves of absence. Mr. Marsh is charged with no unpaid leaves of absence. Therefore his seniority has accrued from the date of his employment.

tive action provisions of Article XIV of the collective bargaining agreement entitled "Vacancies, Transfers and Reduction in Staff" the Board transferred Mr. Marsh to a teaching position (English) at a secondary school.

7. The pertinent paragraphs of Article XIV are paragraphs F, G, H and I. The full text of these paragraphs is attached. Paragraph I permits the Board to ignore systemwide seniority in determining which counselors shall be laid off or transferred and consider only the District's over all instructional needs, teacher certification and qualifications and affirmative action goals.

The goal was a counseling staff including a percentage of minorities that exceeded by 5% the percentage of minority teachers to the total teaching staff (including counselors) in the secondary level teacher labor pool in existence at the time of layoff.

Affirmative action provisions did not, however, apply to filling of vacancies on the counseling staff. In the event of a vacancy or an increase in the number of counselor positions, laid off or transferred counselors are guaranteed the right to return to counseling on the basis of seniority (last out first back) for a period of three years.

8. In the 1981-82 school year Mr. Marsh exercised his seniority rights to claim a counselor's position.

9. In the 1982-83 academic year he was again transferred to a teaching position. He remained in a teaching position during the 1983-84 academic school year.

10. Two counselors retired at the close of the 1983-84 academic school year, and on August 27, 1984 at the opening of the 1984-85 school year Mr. Marsh was reassigned to a counseling position.

11. The number of counselors employed by the School District is dictated by accreditation requirements of the North Central Accrediting Agency. A counselor may be assigned no more than 350 students.

12. The Board will employ 43 counselors in the 1984-85 academic school year. Affirmative action goals have been met. Each counselor's complement of students is at or near the allowed maximum (350).

13. Of the 43 counselors, the counselor having the most credited systemwide seniority was employed September 7, 1954, and the counselor having the least credited systemwide seniority was employed September 18, 1967. No persons, other than those already on the Board's payroll, have been employed as counselors since September 18, 1967. Her credited seniority dates from February 3, 1971.

13. Of the white counselors employed in the District in the 1984-85 school year, Mr. Marsh has the least credited seniority. Seven black counselors have less credited seniority than Mr. Marsh.

Given the age of the counseling staff[2] and thus the potential for a greater number of vacancies in the next few years; the fact that each counselor's student load is at or near the allowable maximum; and the increased number of students at the secondary level resulting from the addition of the ninth grade to the District's high schools accompanied by the adoption of a middle school plan, it is highly improbable that Mr. Marsh will be reassigned to a classroom teaching position during the remainder of his teaching career.

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[2] Three counselors are 63 years of age; four are between 60 and 63; seven are between 55 and 60.

The current collective bargaining agreement expires August 31, 1985. Whether the provisions of Article XIV challenged by Mr. Marsh in this action will be included in the next collective bargaining agreement has not yet been determined.

/s/ Stuart A. Boze

Subscribed and sworn to before me this
29th day of August, 1984.

/s/ Duane Johnson
Notary Public, Genesee County, Michigan
My Commission expires: 1-5-87

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ARTICLE XIV

Vacancies, Transfers, and Reduction in Staff

A. Although the Board and the UTF recognize that frequent transfers of teachers from one school to another is disruptive of the educational process, they also recognize that some transfers will be necessary.

B. Transfers and changes of assignment shall be on a voluntary basis whenever possible.

C. When involuntary assignments or transfers are made, teachers will be given fifteen (15) days notice of said transfers, and the reasons therefor in writing, except that in those cases in which a transfer must be made in less than fifteen (15) days, the aforementioned written notice will be given as time will allow. All involuntary transfers will be given an opportunity to state in writing the reasons for their objection to the transfer.

D. Teachers shall be given an opportunity to apply, without giving reasons, for transfers to be effective the next school year if their application is made by April 30; provided, that if the application is made after April 30, the teacher shall state the reasons for the transfer request or if the request is for transfer to a particular school, the teacher shall be obligated to state the specific reasons for the choice of the school. A list of vacancies within the bargaining unit shall be posted on a conspicuous bulletin board in the Office of Personnel Services and a copy shall be mailed to the UTF by the 15th day of each month. If a teacher requests a transfer under this Paragraph and is refused, he/she shall be notified in writing of the reasons therefor if he/she so requests. No teacher shall be discriminated against because of a request to transfer.

E. When a reduction in the number of teachers in a school is required during the academic year as determined in Appendices D-1, D-2, or D-3, the administration shall notify all teachers in the affected school(s) in elementary, and affected department(s) in secondary of the reduction and shall provide an opportunity for the reduction to be made through volunteers. If a teacher volunteers and is so designated for an involuntary transfer through application of the criteria provided in Provision F for the reduction, said teacher(s) shall be considered as involuntary transfer(s) for purposes of Provision G.

After the academic year is completed, a teacher designated for involuntary transfer and subsequently assigned, may allow and/or recruit another teacher from his or her former building to volunteer to take his or her place, provided there is no violation of Sections F and G herein and upon concurrence of the "receiving" and "sending" building principals and the Office of Personnel Services. Upon agreement being reached by the aforementioned parties, the teacher replacing the previously assigned involuntarily transferred teacher will be considered to be involuntarily transferred under Provision G-1, for purposes of said placement.

F. Should involuntary transfers be found to be necessary, the selection of such teachers to be involuntarily transferred shall be determined on the basis of the following criteria:

1. District overall instructional needs;
2. Teacher certification and qualifications;
3. Affirmative action goals;
4. Extracurricular needs;
5. uninterrupted systemwide seniority (service in the Flint School District);

6. Other necessary and reasonable considerations, determined by the Board after consultation with the UTF.

G. Teachers employed by the Board (except temporary and substitute teachers) will be given consideration as follows in filling any vacant position in the bargaining unit:

1. Whenever any position in the bargaining unit shall become vacant, the Board shall give first consideration to involuntarily transferred teachers in the filling of that vacancy. If the Board determines that the needs of the district will not be met by filling the position in this manner, the Board shall then consider requests from teachers who are not on layoffs or leave for transfer unless the vacancy is the result of previous transfer.

2. Vacancies not filled in the aforementioned manner shall be filled from among those teachers who are on leave, have not been laid off and whose leaves have expired.

3. Should vacancies not be filled in provisions 1 and 2 above, said vacancies shall be filled from among those teachers who have been laid off including teachers on leave who have been laid off in accordance with the provision of Article XIV-I-2.

The Board's decision with regard to which teacher shall fill such vacant position shall be final, provided that the criteria set forth in paragraph F shall not be applied arbitrarily nor capriciously, and provided further that the Board's right to make a final determination with regard to this paragraph does not diminish the Board's responsibilities with regard to the remaining paragraphs of this article.

H. The Board shall prepare and present to the UTF a seniority list for the 1982-83, 1983-84, and 1984-85 school years. Any teacher or the UTF may challenge the accuracy of the seniority list or the update, provided if the seniority date is not challenged within sixty (60) days after its issuance it will be considered as correct for that respective year or until such time as a revised seniority list is issued.

The seniority list shall include the following:

1. Full name of teacher.
2. Years of uninterrupted service in the Flint School District.
3. Tenure status as of the printing of the seniority list.
4. Certification.
5. Major(s) and Minor(s).

I. *Reduction in Staff*

If the Board shall determine to reduce staff, the following procedures shall be controlling:

1. *Layoff*

a. The Board shall determine the subject areas in secondary schools and the number of positions in elementary schools in which reductions will be made and the number of positions affected and will notify the UTF of such determinations.

b. Nontenure teachers shall be laid off first followed by tenure teachers.

c. The order of layoff of nontenure teachers shall be determined by the Board. In secondary schools, the order of layoff of tenure teachers in each affected subject area shall be based upon the length of uninterrupted service in the Flint School District i.e., the longest uninter-

rupted service in the District shall be the last in his/her subject area to be laid off.

In elementary schools, the order of layoff of tenure teachers shall be based upon the length of uninterrupted service in the Flint School District regardless of the grade level to which the teacher may be assigned at the time of layoff.

Where length of service is the same, the tenure teacher in the secondary schools with the highest qualifications in his/her subject area will be retained. Where length of service is the same, the tenure teacher in elementary schools with the highest qualifications will be retained regardless of the grade level to which he/she is assigned. Where length of service and qualifications are the same, the teacher in the secondary schools with the best performance record in his/her subject area and the tenure teacher in the elementary schools with the best performance record regardless of the grade level to which he/she is assigned will be retained.

If layoffs are to occur, a seniority list in accordance with this paragraph shall be prepared by the Board and a copy thereof be given to the UTF.

It is understood that should the Board determine to reduce staff among positions requiring more than a work year of thirty-nine (39) weeks as determined by the teacher's individual contract of employment (e.g., academic counselors, librarians) said reduction will be made in accord with the provisions of Article XVI, F-1; -2; -3 (herein defined for 40 week employees for purposes of lay-off from 40 week employment to 39 week employment as a plus five percent from the ratio of minority teachers to majority teachers in the second-

ary level teacher labor pool in existence at the time of lay-off; -5 and Provision G, subject to the following limitations:

A teacher assigned to one of the aforesaid positions and who is laid off from a 40-week position and transferred into a 39-week position under Provisions F and G of this Article shall be granted an extra week's work in some appropriate capacity for one (1) year subsequent to the layoff.

The above provision will not be used to circumvent seniority (e.g., laying off a more senior minority counselor to retain a less senior minority counselor).

Additionally, if the area reduced is restaffed (moving toward the number the area was at before the decrease) district wide, the teacher(s) transferred out shall be guaranteed return to the area on the basis of seniority (last out, first back) for a period of three years.